Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL CHANDLER, invididually and as father and next friend of JESSE CHANDLER,

Petitioners,

v.

DON SIEGELMAN, in his official capacity as Governor of the State of Alabama and as President of the State Board of Education, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Following remand of this case for consideration of this Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), did the Eleventh Circuit disregard this Court's holding when it reinstated its 1999 opinion permitting prayers by students and nonschool persons over the public address system at football games, compulsory school assemblies, and graduation ceremonies and over the classroom intercom?

2. Absent any evidence that the state has created a public forum in its schools, does it violate the Establishment Clause for school officials to permit both students and nonschool persons to offer group prayer before a captive audience of K-12 students in classrooms, school-sponsored assemblies, sporting events and graduation exercises using the machinery of the state, including compulsory attendance laws, public address and intercom systems?

LIST OF ALL PARTIES TO THE PROCEEDING

Michael Chandler and Jesse Chandler, a minor child, by and through his father and next friend, Michael Chandler, Petitioners/Plaintiffs.

Don Siegelman, present Governor of Alabama, in the Governor's official capacity as president of the Alabama State Board of Education; Forrest H. "Fob" James, Jr., former Governor of the State of Alabama; William H. Pryor, Attorney General of the State of Alabama; Alabama State Board of Education; Dr. Ed Richardson, in his official capacity as Superintendent of the State Board of Education; Dr. Stephanie Bell, in her official capacity as a member of the State Board of Education; David Byers, in his official capacity as a member of the State Board of Education; Bradley Byrne, in his official capacity as a member of the State Board of Education; Mary Jane Caylor, in her official capacity as a member of the State Board of Education; Dr. Ethel Hall, in her official capacity as a member of the Alabama State Board of Education; G.J. "Dutch" Higginbotham, in his official capacity as a member of the Alabama State Board of Education; Sandra Ray, in her official capacity as a member of the State Board of Education; Mary Etta Bailey, in her official capacity as a member of the DeKalb County Board of Education; Dot D. Burke, in her official capacity as a member of the DeKalb County Board of Education; Greg Buttram, in his official capacity as a member of the DeKalb County Board of Education; Willard A. Israel, former member of the DeKalb County Board of Education; Tommie Johnson, in his official

capacity as a member of the DeKalb County Board of Education; Richard R. Land, in his official capacity as Superintendent of the DeKalb County Board of Education; Weldon Parrish, former Superintendent of the DeKalb County Board of Education; Jimmy Wilbanks, in his official capacity as a member of the DeKalb County Board of Education; Johnny Young, in his official capacity as a member of the DeKalb County Board of Education.

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CITATIONS OF OPINIONS AND ORDERS

The order of the United States Circuit Court of Appeals for the Eleventh Circuit denying the petition for rehearing is reprinted as Appendix I to the petition. The opinion of the Eleventh Circuit reinstating its earlier opinion is reported at 230 F.3d 1313 (11th Cir. 2000) and is reprinted as Appendix A. Its earlier opinion is reported at 180 F.3d 1254 (11th Cir. 1999) and is reprinted as Appendix B. The opinion of this Court vacating the earlier opinion and remanding is reprinted as Appendix C. The opinion of the district court granting in part and denying in part the motion for partial stay of the injunction is reported at 998 F. Supp. 1255 (M.D. Ala. 1997) and is reprinted as Appendix D. The opinion of the district court regarding the constitutionality of Alabama's school-prayer statute is reported at 958 F. Supp. 1550 (M.D. Ala. 1997) and is reprinted as Appendix E. The district court's permanent injunction is reported at 985 F. Supp. 1062 (M.D. Ala. 1997) and is reprinted as Appendix F. The opinions of the district court relating to the issuance of the injunction are reported at 985 F. Supp. 1068 (M.D. Ala. 1997) and 985 F. Supp. 1094 (M.D. Ala. 1997) and are reprinted as Appendix G and Appendix H.

BASIS FOR JURISDICTION

The court of appeals entered its judgment on October 19, 2000. The petition for rehearing en banc was denied on April 13, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS and STATUTES

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The full text of Alabama Code § 16-1-20.3 (1975 & 1993 Supp.) is set forth in Appendix J.

STATEMENT OF THE CASE

In 1993, Alabama enacted its fourth school-prayer statute within a 15-year period. The operative portion of the statute provides:

> On public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocations and/or benedictions, shall be permitted

> during compulsory or non-compulsory school-related student assemblies, school-related student sporting events, school-related graduation or commencement ceremonies, and other school-related student events.

Ala. Code §16-1-20.3(b) (1975 & 1993 Supp.).

On February 1, 1996, Michael Chandler and his son Jesse sued, challenging the constitutionality of the statute both facially and as applied in DeKalb County, Alabama where the family has lived and worked and where Jesse attends one of eight K-12 schools. He is now a senior and is expected to graduate on May 23, 2001.[1]

The trial court concluded, in findings not challenged on appeal, that the following religious activities had taken place in DeKalb County schools. DeKalb admitted that these activities were applications of the school-prayer statute.

•**Christian prayers over the loudspeaker at high school football games offered by students or clergy**. For several years prior to suit, Christian prayers were recited by students or clergy over the loudspeaker at DeKalb County football games. DeKalb County stipulated to control over access to the public-address system at home football games. There is no evidence that DeKalb County

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[1] To the extent that mootness may be a concern at a later date, the petitioners ask the Court to follow *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and vacate the affected portions of the lower courts' decisions. *See also Joint Sch. Dist. 241 v. Harris*, 515 U.S. 1154 (1995) (vacating as moot lower court ruling).

ever set aside use of the system for student expression or otherwise established a public forum for the discussion of other topics or viewpoints. Nor is there evidence that prayers from non-Christian religious traditions were offered or that any other type of speech, other than announcements related to the games, was broadcast. In fact, the superintendent stated the prayers were a "tradition" that would continue despite court rulings to the contrary. He also stated that DeKalb's official policy was "to allow religion in the schools whenever possible."

Specimen prayers before and after suit were videotaped and entered into evidence. While attendance at football games is not a curricular requirement, most students attend, including students not yet in high school and students who have graduated. Jesse Chandler has attended such football games. In fact, many members of the community attend, including recently graduated students. *See* App. D27-29.

•**Christian prayers in the classrooms as part of orchestrated student activity**. In a number of cases in DeKalb County, students led their peers in corporate prayers or religious devotionals in the classroom or over the intercom during the school day. For example, the teacher would select a student to lead the prayer, or the teacher would give a signal and the students would pray in unison. In Jesse Chandler's homeroom, his teacher selected students to offer prayers or Bible readings and did so herself in the absence of student "volunteers." Students also prayed over the school-intercom system during homeroom. There is no evidence that school officials made the school intercoms available for other speech unrelated

to school business or allowed school clubs to conduct club activities over the intercom system.

•**Christian prayers at compulsory school assemblies**. During the school day, DeKalb County public schools hold assemblies where attendance is required or where students must choose between attendance or study hall. School officials control the assemblies and decide the content of the programs. At these assemblies, students or clergy have led prayers and religious devotionals. For example, assemblies for programs such as D.A.R.E. have featured prayer. Although this drug-awareness program is not compulsory, all fifth-graders, including Jesse Chandler, participated. Both before and after suit, Jesse Chandler attended assemblies where prayers or devotionals were offered.

•**Christian prayers at high-school graduation ceremonies**. For several years prior to suit, graduation prayers, identified as "invocations" or "benedictions," were led by students or clergy. They were listed on preprinted programs separately from valedictory or salutatory addresses, which were presented independently. As stipulated, school officials plan the ceremonies and control the form and content of the graduation programs. There have been no prayers from non-Christian religious traditions, and no speech besides prayer has ever been offered during the prayer segments. Several prayers were videotaped and entered into evidence, and each invokes the name of Jesus. After the suit was filed, the word "invocation" was dropped from the preprinted program at Sylvania School and the words "Class Historian" inserted. For three years in a row, the class historian led the

audience in prayer, just as had taken place during the "invocation" prior to suit. In addition to Sylvania, other schools continued to permit prayer after suit was filed.

•**Other Christian religious activities in the DeKalb County schools.** In addition to the above activities conducted pursuant to the statute, DeKalb County officials permitted ministers and evangelists to speak at school events such as mandatory drug- or AIDS-awareness assemblies and to pray, proselytize, make extended religious remarks, and invite students to church functions. School officials also allowed nonschool persons to enter classrooms to make presentations and distribute Gideon Bibles.

Although school officials promised to intercede to stop religious harassment of students, they did not do so. The trial court found that DeKalb County had permitted classmates' harassment of Jesse Chandler for a period of months. Between October 1996 and April 1997, approximately 175 of 200 students stood and prayed aloud when Jesse entered the lunchroom, on a signal of "One, two, three, pray." Despite complaints from the Chandler family, both the school principal and the superintendent refused to stop the conduct. Jesse was forced to take his lunch alone in a classroom.

On October 23, 1997, DeKalb filed a pleading stating that it wanted clarification on the question of whether "a federal judge has the authority to tell school officials and administrators in DeKalb County how to handle the issue of school prayer" and "if a federal judge can do whatever he wants whenever he wants to." (App. E12.) On October 29, 1997, the trial court enjoined

DeKalb from "permitting" "school-sponsored or officially sanctioned" prayers. 985 F. Supp. 1062, 1063-65. The word "permitting" tracks the "shall permit" language of the statute that DeKalb contended it applied in sponsoring such prayers.

The district court repeatedly stressed that its injunction reached only "school-organized" or "officially sanctioned" prayer – that is, prayer occurring in situations where school officials actively control the setting and students cannot realistically express opposing views or offer other unsanctioned speech. The injunction explicitly protected students' rights under the federal Equal Access Act (for grades 7-12). (App. F4-F5, F9.) It also allowed students to distribute religious literature to the same extent that they could distribute other literature, to express religious beliefs in school assignments, to wear religious clothing and jewelry, to attempt to persuade their peers on religious issues, and to quietly engage in religious activity during noninstructional time. (*Id.*)

The defendants[2] appealed only those provisions of the injunction prohibiting school officials from "permitting" students' and nonschool persons' religious exercises at "school-sponsored" or "officially sanctioned" activities. The defendants did not challenge a single factual finding on appeal.

The first Eleventh Circuit decision was issued on July 13, 1999. It vacated the injunction, holding that there

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[2] Alabama Governor Forrest H. "Fob" James, Jr. raised only one issue on appeal, arguing that the Bill of Rights does not apply to the state of Alabama.

is no state action when a student or a nonschool "other"[3] prays as part of a school-controlled event. It further held that if school officials fail to permit prayers by students and nonschool "others" during school-sponsored events the officials control, the officials evince unconstitutional hostility toward religion and practice "viewpoint discrimination." Although the panel found fault with only pieces of the injunction – specifically, the trial court's use of the word "permit" with regard to the speech of students and nonschool others – it vacated the entire injunction. In addition, the opinion was filled with language complaining about efforts to "cleanse" religion from the public schools. (*See, e.g.*, App. B15 ("'Cleansing' our public schools of all religious expression, however, inevitably results in the 'establishment' of disbelief – atheism – as the State's religion.").)

After their petition for rehearing *en banc* was denied, the Chandlers petitioned this Court for certiorari. This Court granted the writ, vacated the Eleventh Circuit's opinion, and remanded for further findings not inconsistent with *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). On October 19, 2000, the Eleventh Circuit reinstated its earlier, pre-*Santa Fe* opinion, which held that prayers and devotional activity, albeit delivered

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[3] The Eleventh Circuit explained that its use of the word "student" throughout the opinion should be understood to include all nongovernmental "private parties." (App. B6 at n.6.) It held that "students or other private parties" have a First Amendment right to pray at school-related events. (App. B22. *See also* App. B25.) In DeKalb County, the nongovernmental private parties offering prayers were Christian ministers and evangelists. (*See* App. G27, G43, G60.)

to captive student audiences using school loudspeakers at school events or in the classroom, were "private" speech and that enjoining this speech amounted to "viewpoint discrimination."

The Chandlers again petitioned for rehearing *en banc*. The *en banc* petition was denied April 13, 2001. This petition for certiorari, the Chandlers' second, timely follows.

REASONS FOR GRANTING THE WRIT

First, this petition places in issue this Court's province to pronounce the law of the land — on a matter of the most profound importance: the establishment of religion. This Court's *Santa Fe* decision repudiated each and every rationale upon which the Eleventh Circuit's *Chandler I* decision rested. Despite *Santa Fe*'s clear teaching, the Eleventh Circuit reinstated its earlier opinion as if *Santa Fe* had never been decided. Second, even if *Santa Fe* had never been decided, this Court has never allowed--and other Circuits do not allow--the machinery of the state to be used to sponsor religion, especially in the public schools. The Eleventh's Circuit decision is revolutionary among the Circuits and irreconcilable with this Court's precedents.

I.

The Eleventh Circuit's Decision Directly Contradicts this Court's Decision in *Santa Fe*

Last Term, in *Santa Fe*, this Court struck a school-board "policy that permits, but does not require, prayer initiated and led by a student," struck it on its face, and struck it even when it purportedly created a species of

"equal access" for secular speech. 530 U.S. at 294.

This Court in *Santa Fe* did not obscure the reasons for its holding: The "student-initiated" prayers were "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message [was] broadcast over the school's public-address system, which remains subject to the control of school officials." *Id.* at 307. This Court pointedly noted that "[i]t is in a setting such as this that '[t]he board has chosen to permit' prayer." *Id.*

Despite this Court's clear teaching on coercion, endorsement, and the school environment, the Eleventh Circuit on remand held that school officials *must* permit prayers initiated by students and nonschool persons over the public-address system at football games, compulsory school assemblies, at graduation ceremonies--even in classrooms. No decision could be more antithetical to *Sante Fe* than the Eleventh Circuit's.

A. The Eleventh Circuit Ignored *Santa Fe*'s Teaching about Private v. State-Sponsored Prayer, Focusing Instead on the Identity of the Speaker.

The school-sponsored context, and not the speaker's identity, dictated this Court's finding of an Establishment Clause violation in *Santa Fe*. Prayers "at government-sponsored, school-related events," *id.* at 301, involve "both perceived and actual endorsement of religion." *Id.* at 305. They bear "the imprint of the State and thus put school-age children who object[] in an untenable position." *Id.*

(*quoting Lee v. Weisman*, 505 U.S. 577, 590 (1992)). Prayer in this setting, *Santa Fe* teaches, cannot "be regarded as 'private speech.'" *Id.* at 302.

Yet the Eleventh Circuit explicitly found such speech in such a setting to be "private," as long as it is not uttered by a school official.[4]

In *Santa Fe* this Court rejected the very argument that prayers in this setting are "private" speech merely if uttered by students,[5] and explicitly found that a private-speech rationale does not apply to, *e.g.*, prayer over the school's p.a. system. *Compare* 530 U.S. at 302, 309-10 (noting distinction between government speech endorsing religion and private speech doing the same, but stating that prayers over the p.a. system are not private speech) *with* 180 F.3d at 1258, 1264 (using *Mergens*[6] to support finding

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[4] No one – including the Chandlers and the trial court – has ever contested the right of students to engage in *truly* private prayers, *i.e.*, praying before a test or saying a private grace before meals in the lunchroom. The injunction forbids (and the Eleventh Circuit directed) school officials to permit the praying of audible, corporate prayers that become part of the school-sponsored event at issue. (*Compare* App. B21-B22 *with* App. F4-F7.) The type of prayers reached by the injunction would include a student or member of the clergy using the school microphone and saying to a captive audience, "Let us pray," but not a group of students praying among themselves in the stands when all are free to move around. (*See* App. E23-26; App. D69-D71, D87-91.)

[5] *Chandler* also allows persons *other than students* to pray before a large school-assembled audience using school facilities and equipment over which school officials have plenary control. 180 F.3d at 1257 n.6, 1264.

[6] *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

that such prayers are "private" speech). The Eleventh's Circuit's reinstatement following remand is flatly defiant of this central aspect of *Santa Fe*.

Simply put, this Court held that permitting *a student* to pray did not "turn public speech into private speech," and did not "insulate the school from the coercive element of the final message." *Id.* at 2279. Permitting a *student* to say the prayer over the school microphone, at a school event, before a school-organized audience, is not a "circuit breaker" insulating the school from endorsement any more than the deployment of a student insulates the school from the coercive element of the message. *Compare id.* at 305, 309-10 *with* 180 F.3d at 60-63 & n.15. The Eleventh Circuit treats the fact that a person who is not employed by the school board is the person praying over the intercom as a constitutional cloaking device.[7] But this Court sees past

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[7] The Eleventh Circuit's justification for its notion that student-composed prayers at school-controlled events are "private" involves its correlative assumption about "genuine" (meaning unscripted) prayers. The prayers if unscripted are "genuine" and if genuine are unscripted, and thus "private," so that to proscribe them is to engage in crass censorship. *See* App A8. This holding, the panel states, is "complementary rather than inconsistent" with *Santa Fe*. App. A3. In fact, the Eleventh Circuit disregards the fact that the actual, impermissible prayers at issue in Santa Fe were themselves "genuine": "the particular words used by the speaker are not determined" by anyone but the speaker. 530 U.S. at 305-06. The unscripted nature of the prayers did not save the prayers in *Santa Fe*, however. School control and school context, not the existence of a school-authored script, are what make the Establishment Clause violation, and the Eleventh Circuit is simply mistaken in its insistence that curtailing the violation amounts to censorship: "'Regardless of whether the prayers are¼ *spontaneously initiated* at

formalism and artifice – *Lee*, 505 U.S. at 595--and has explicitly warned the lower federal courts not to "accept what is [an] obviously untrue" rationalization for unconstitutional action or to "turn a blind eye" to context and "social facts." *Id.* at 315. The social fact of a coercive school setting, and a school-owned microphone, cannot be ignored consistent with this Court's Establishment Clause jurisprudence. In *Santa Fe*, this Court found the pressure to conform religiously, in the school context, as unconstitutional as any more direct means the state might employ. *Id.* at 311-12 (*quoting Lee*, 505 U.S. at 593). The simple meaning of this statement is that students, just like school officials, are proscribed from using the machinery of the state to allow students to promote religion from them. The Court of Appeals operated on just the opposite assumption. *Compare id. with* 180 F.3d at 1260, 1263.

The Eleventh Circuit commands school officials to permit the very type of religious activity that this Court has

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these¼school-sponsored events, school officials are present and have the authority to stop the prayer.'" *Id.* at 300 (emphasis added). *See also id.* n.11.

The district court properly protected "genuine" student prayer; it proscribed ONLY prayer that was school-sponsored or officially sanctioned – prayer that in the context connotes governmental endorsement. (*See* App. F1.) It did not proscribe any "student from voluntarily praying at any time before, during, or after the school day." 530 U.S. at 313. Despite the Eleventh Circuit's conflation of "genuine" prayer with student-composed prayer at school-sponsored events, Justice Souter's observation that private prayer spurns the state's microphone remains true. *See Lee*, 505 U.S. at 630-31 (Souter, J., concurring).

forbidden: audible prayer and religious activity in the classroom;[8] prayer and devotional speech over school public- address systems; and prayer and devotional speech by students and nonschool persons at school-controlled events, including assemblies, sporting events and graduation ceremonies. According to the Eleventh Circuit, as long as such prayer is not conducted or commanded by school officials, it must be permitted. (App. A7-8 and App. B21-23.) According to the Eleventh Circuit, prayers by persons who are not employed by the school board have no potential for coercion. 180 F.3d at 1263 n.13. The school setting, the use of the state's machinery, and the religious rights of the audience do not factor in the Eleventh Circuit's calculus.

But the prayers that school officials are required to countenance by the Eleventh Circuit are "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property," "broadcast over the school's public-address system, which remains subject to the control of school officials" at school-sponsored events. *Compare* 180 F.3d at 1261-63 and App. A5-6 *with* 530 U.S. at 300-01, 307-09. No imaginable circumstances could be more clearly governed by this Court's decision in *Santa Fe*. The principle, the social facts, and many of the operative facts in DeKalb County are identical to those explored in *Santa Fe*. Respectfully, this being so, the Eleventh Circuit is not free to declare a local option on the Establishment Clause that is utterly at odds with this Court's authoritative articulation

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[8] *See, e.g., Abington Twp. Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

of the law.

As this Court stated in *Santa Fe*: "[N]othing in the Constitution prohibits any public school student from voluntarily praying at any time before, during, or after the school day. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer." *Id.* at 313. The injunction vacated by the Eleventh Circuit proscribes only *school-sponsored* or *officially sanctioned* prayer and carefully removes from its ambit truly private prayer. This Court, like the district court, correctly marked the boundaries between state-sponsored and private speech. The Eleventh Circuit has erroneously erased these carefully drawn boundaries.

B. *Santa Fe* Rejected the Eleventh Circuit's Viewpoint Neutrality Theory.

Intimately related to the Eleventh Circuit's "private speech" theory and holding is another theory and holding rejected by *Santa Fe* that "viewpoint neutrality" can be invoked to sanitize Establishment Clause violations. The Eleventh Circuit purportedly locates support for this thesis in an erroneous application of *Mergens* and its progeny.[11] This notion, however, has no support in the record or in this Court's precedents. Respectfully, this theory was wrong before *Santa Fe*, but clinging to it after *Santa Fe* is indefensible.

This Court plainly stated in *Santa Fe* that the

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[8] *See generally* App. B25 (summarily invoking selected forum cases).

Mergens line of cases has no application in the school-sponsored prayer context. *Id.* at 302. *See also id.* at 303 & n.12. Accommodation, as *Mergens* recognizes, is not the same thing as sponsorship. Prayer over the school-owned intercom, however, transcends accommodation, particularly where the social facts indicate a policy to have prayer wherever possible in the school setting. This Court in *Santa Fe* explicitly rejected the argument that school officials' permitting other speech besides prayer means that permitting prayer is merely a "neutral accommodation of non-coerced, private, religious speech." Id. at 301 & n.11. *This Court in* Santa Fe *expressly rejected the argument that a school can divorce itself from an Establishment Clause violation by claiming that its prayers foster "neutrality rather than endorsement." Id.* at 305. This rejected "neutrality versus endorsement" position is exactly the law of the Eleventh Circuit after *Chandler* unless this Court corrects it here. 180 F.3d at 1260.

II.

EVEN IF SANTA FE HAD NEVER BEEN DECIDED, THIS COURT'S LONG-STANDING PRECEDENTS COMMAND REVERSAL.

For over 50 years, this Court's school-prayer holdings have consistently reaffirmed the same basic rules: public school officials may not promote or endorse a particular religion or religion generally, nor may they direct or encourage student participation in religious activities. *Wallace v. Jaffree*, 472 U.S. 38 (1985);

Abington Twp. Sch. Dist. v. Schempp, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). Likewise, school officials may not turn over classrooms and other school-controlled events to outside individuals to engage captive student audiences in prayer, religious instruction, or other devotional activity. *Lee v. Weisman,* 505 U.S. 577 (1992); *People ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

As this Court has frequently observed, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary schools." *Lee*, 505 U.S. at 592. *See also Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *Schempp*, 374 U.S. at 307 (Goldberg, J., concurring). This Court recognizes that the public schools exercise tremendous control and influence over schoolchildren who are highly impressionable and subject to peer pressure, even when the school-controlled event is "voluntary," and that "prayer exercises" carry special coercive power. *See Lee*, 505 U.S. at 592-93; *Edwards*, 482 U.S. at 584; *McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring).

The Eleventh Circuit ignored this Court's concern with captive K-12 audiences, particularly the rights of nonadherents of the speaker's religion. *Compare* App. A20 ("[t]hose who do not espouse a speaker's religious belief are free not to listen, and to express their disagreement by not participating in any way") *with Lee*, 505 U.S. at 593 ("It is of little comfort to a dissenter . . . to be told that . . . the act of standing or remaining in silence signifies mere respect, rather than participation."). Under the rubric of protected private speech, the Eleventh Circuit subordinated

the rights of captive audiences of K-12 school children to the putative free-speech rights of their peers and even adult "others" to lead corporate prayer in the classroom, over the school intercom, over the microphone at assemblies, at sporting events, and at graduations. Rather than focusing on the use of the machinery of the state as this Court's precedents command– in the form of mandatory attendance laws, school-sponsored events, classrooms, microphones, and intercoms to convey religious messages – it focused on the identity of the speaker and the proselytizing content of the speech.

The Eleventh Circuit also disregarded this Court's endorsement holdings and gave no consideration to the ways in which permitting prayer and religious activity lends the state's imprimatur to religion. It simply assumed that prayer over the intercom, if not delivered or composed by school officials, was "private" even in the context of a classroom or over a school-owned intercom. But "the Establishment Clause does not limit only the religious content of the government's own communications. Indeed the very concept of endorsement conveys the sense of promoting someone else's message." *County of Allegheny v. ACLU*, 492 U.S. 573, 600-01 (1989). *See also Lee*, 505 U.S. at 592 (secondary-school students are likely to perceive school-sponsored religious exercises as an "attempt to employ the machinery of the state to enforce a religious orthodoxy").

Moreover, as Justice Souter has noted, truly "private" prayer neither seeks nor requires a microphone and an audience. Because students "have no need for the machinery of the State to affirm their beliefs, the

government's sponsorship of prayer . . . is most reasonably understood as an official endorsement of religion." *Lee*, 505 U.S. at 630-31 (Souter, J., concurring). It is for this reason that schools may not "permit" their machinery to be used to sponsor prayer. That has been done here, and it is a violation of the Establishment Clause.

The Eleventh Circuit's cramped view of the state involvement necessary to trigger the Establishment Clause (apparently, a school official praying, composing, or directly commanding prayer) conflicts with this Court's precedents and erodes fundamental Establishment Clause values.

III.
BECAUSE THE ELEVENTH CIRCUIT HAS MISAPPLIED THIS COURT'S PRECEDENTS, THE CIRCUITS REMAIN SPLIT.

Before this Court decided *Santa Fe*, there was a split among the circuits, with the Eleventh Circuit, then as now, being the sole dissenter. While *Santa Fe* should have settled matters, it did not. The Eleventh Circuit still stands alone.

In considering whether prayers and religious speech at school-sponsored events fall afoul of the Establishment Clause, the Fifth, Third, Ninth, Second, and Seventh Circuits have asked not who the speaker is, but whether the machinery of the state has been used to endorse religion. Unsurprisingly, these courts, like this Court in *Santa Fe*, reached a conclusion opposite to that of the Eleventh Circuit.

For example, in *Collins v. Chandler Unified School District*, 644 F.2d 759, 761 (9th Cir. 1981), the court found no meaningful distinction between school authorities' permitting and students' directing of religious exercises at school-sponsored assemblies and upheld an injunction prohibiting school officials from "'permitting, authorizing, or condoning the saying of public prayers by students.'" It did so explicitly because it recognized that school officials do not as a practical matter have a "hands-off" attitude toward major school functions and that school officials control access to school facilities. 644 F.2d at 762-63. Likewise, in *Cole v. Oroville Union High School*, 228 F.3d 1092 (9th Cir. 2000), the Ninth Circuit, following *Santa Fe* and *Lee,* held that a school district would run afoul of the Establishment Clause were it to permit a student to deliver a religious invocation or an overtly proselytizing valedictory address at graduation, using the school's microphone, the school's platform and the audience assembled for the school event.

In *ACLU v. Blackhorse Pike Regional Board of Education*, 84 F.3d 1471, 1477-79 (3d Cir. 1996) (*en banc*), the Third Circuit likewise held that even if school officials delegate control over some aspect of a school-sponsored graduation program to students, an Establishment Clause violation may still occur because the program is school-sponsored and *Lee*'s coercive effects can exist with student-led prayer. Similarly, the Second Circuit, in *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965), reversed an order that prohibited school officials from preventing student-led prayer during the school day, reasoning that the "closely

organized schooling of young children" rendered "'student-initiated' prayers" at school events "an illusion." 382 F.2d at 1001.

Finally, the Seventh Circuit has rejected the Eleventh Circuit's novel theory that religious activity conducted by nonschool persons is immunized by lack of state action. It has held that, far from immunizing them, the very fact that school officials give nonschool others *permission* to use the machinery of the state, by opening up their classrooms, auditoriums, and captive student audiences to the Gideons, makes these "others" state actors for purposes of the Establishment Clause. *Berger v. Renssalaer Cent. Sch. Corp.*, 982 F.2d 1160, 1165-66 (7th Cir.), *cert. denied*, 508 U.S. 911 (1993).

Likewise, the Third, Ninth, Seventh, and Fifth Circuits have rejected the Eleventh Circuit's viewpoint neutrality justification for an Establishment Clause violation. In all cases, the lack of a public forum was central to their reasoning. In *Blackhorse Pike*, the Third Circuit rebuffed the free-speech justification for prayer led by elected students at graduation because it found no public forum. *See* 84 F.3d at 1477. In *Collins*, the Ninth Circuit found unpersuasive a proffered free-speech justification for student-led prayer at school assemblies because of the constraints of the school setting. *See* 644 F.2d at 762. In *Berger*, the Seventh Circuit found that, where the state opens its classrooms to the Gideons, the "free speech of private actors" rationale fails as a matter of law. *See* 982 F.2d at 1166-67. The *Berger* court noted the distinction between the empty classrooms of the *Mergens* line of cases and the captive audience hearing a school-

endorsed message while seated in those same classrooms. *Id.* The reasoning of *Blackhorse Pike*, *Berger* and *Collins* was vindicated with this Court's *Santa Fe* decision.

The Eleventh Circuit decision sin this case are in defiance of this Court's ruling in *Santa Fe*, and its disregard of settled principles laid down for decades by this Court renders it an anomaly among its sister courts. Because a citizen's rights should not depend on where he or she lives, and this Court has said they do not, the decision should be abrogated by this Court. *See Wallace v. Jaffree*, 472 U.S. 38 (1985) (Bill of Rights applies to the States.

CONCLUSION

Because the Eleventh Circuit's disposition directly contradicts this Court's *Santa Fe* decision, this Court should grant the writ and reverse. In addition, the Court should resolve the conflict among the circuits and provide guidance to them by granting the writ in this case. The Eleventh Circuit's decision should not stand. To the extent that the case becomes moot while the petition is pending, petitioners ask this Court to follow *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) and *Joint Sch. Dist. 241 v. Harris*, 515 U.S. 1154 (1995), and vacate the affected portions of the lower court's decisions.

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